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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940

No. 577

ARTHUR W. MITCHELL, Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, FRANK O. LOWDEN, *et al.*, Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR APPELLEES

Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company.

Illinois Central Railroad Company.

The Pullman Company.

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Illinois Central Railroad Company.

The Pullman Company.

PRELIMINARY STATEMENT.

The case before the Interstate Commerce Commission is reported in 229 I. C. C. 703, *Arthur W. Mitchell* v. *Chicago, Rock Island & Pacific Railway Co., et al.* The parties to this brief (appellees here) were defendants in

the proceeding before the Commission.[1] The Commission having dismissed his complaint, appellant brought an action before the United States District Court at Chicago and prayed that the court enter its decree that the order of the Commission be set aside, annulled and vacated (R. 40). The prayer further asked that "a decree be entered granting to the plaintiff the relief prayed for in his complaint filed before the said Commission." A special three-judge court was assembled to hear the case (Judicial Code, 28 U. S. C. ~~308~~ sec. 47), and after hearing all parties that court entered its separate findings of fact and conclusions of law and ordered that the cause be dismissed for lack of jurisdiction (R. 52, 53). The court's findings and conclusions are as follows:

Findings of Fact.

1. The order here in question was made by the Interstate Commerce Commission after a full hearing.

2. The Commission, after the hearing, found the facts specially, and stated separately its conclusions of law thereon, and they are made a part of these findings and conclusions respectively by reference.

3. The Commission's findings of fact were all supported by substantial evidence.

Conclusions of Law.

1. The findings of the Commission are not erroneous.

2. The order of the Commission is not contrary to law.

3. The order of the Commission contravenes no provision of the Federal Constitution.

4. The order of the Commission is supported by the findings.

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[1] Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees of the Estate of The Chicago, Rock Island and Pacific Railway Company; Illinois Central Railroad Company and The Pullman Company.

5. This court is without jurisdiction to grant the relief sought in the complaint, or any part thereof, and the complaint should be dismissed.

An examination of the above findings and conclusions establishes that the court gave full consideration to the case on its merits.

Appellant has shifted his position since the trial before the Commission's Examiner. At that hearing, appellant Mitchell, addressing the Examiner, made this statement (R. 156): "The question of segregation is not involved." The case proceeded on that assumption. The examiner's report affirmatively found (R. 16) that "for the purpose of this proceeding complainant accepts segregation under the Arkansas statute." In exceptions to that report, as the Commission's opinion shows (R. 27), appellant expressed himself otherwise.[3] When the action to set aside the Commission's order of dismissal came to trial before the three-judge court, appellant Mitchell, as plaintiff and counsel, said to the court (R. 227): "There is no question of segregation involved. We have not said to the railroad that it must let us ride together with the white people. I care as little about riding with white people as they care about riding with me, * * *" In answer to a specific question of the court, "Are you invoking the Arkansas statute?", appellant said, "I asked the Commission to enforce that law but they refused to do so."

In his argument upon appeal to this court, appellant, so far as appellees can interpret his contentions, assumes a different position by maintaining that the statute of Arkansas, which requires the separation of races, does not apply to an interstate passenger.

---

[3] Impliedly the Commission must have taken notice of the statement quoted when it said in its report (p. 170, Rec. 28) that "the present case arose out of the apparent assumptions of the parties that the Arkansas statute was applicable to interstate traffic."

This shifting of positions is respectfully called to the attention of this court in the light of the established rule that a party may not, when a cause is brought up for appellate review, assume a theory inconsistent with or different from that taken by him at the trial.

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 435, 4 Corpus Juris Secundum, 465, Section 241.

With that reservation, appellees will deal in this brief with the argument tendered by appellant's brief, which ignores the declaration of position on the question of segregation which was made both before the Commission and the court below by Appellant Mitchell himself.

Appellees respectfully remind the court that the complaint before the Commission involved only one passenger, and that one in but a single incident; that the only train in issue is the one operating from Chicago, Ill., to Hot Springs, Ark., over the Illinois Central and the Chicago, Rock Island and Pacific railroads, and that the colored compartment car in which, on April 21, 1937, Appellant Mitchell rode in Arkansas has not been in the train since July, 1937, when an entirely different type of car, fully described in the Commission's report (p. 707, Rec. 23), was placed in permanent service.

Appellant's Specification of Errors.

Beginning on page 15 of his brief, appellant specifies nine alleged errors in the final order and decree of the District Court dismissing his prayer for relief.

1. Assigned error No. 1 is treated comprehensively in these appellees' Argument contained in this brief, and it calls for no additional comment at this point. It is pertinent to observe, however, that by accepting, at least for the purposes of this case, the constitutionality of

the Arkansas statute, appellant's reference to the Fourteenth Amendment becomes irrelevant.

2. Assigned error No. 2 rests upon a false factual premise. The report of the Commission, as supported by the evidence, shows that appellees are not denying appellant equal accommodations and facilities, but are providing them in sufficient capacity to meet the normal demand of colored passengers. Appellant's charge that he was denied the equal protection of the laws in violation of the Constitution of the United States obviously refers to the Fourteenth Amendment, which applies only to States, and which Amendment has been removed from the case by appellant.

3. The comment in the preceding paragraph concerning assigned error No. 2 is equally pertinent to alleged errors Nos. 3, 4 and 5. It may be properly added, that these alleged errors are but a restatement in different phrasing of the allegations which were made by the appellant in his complaint before the Interstate Commerce Commission, and which the Commission considered in reaching its decision under the Act which it administers. It was not for the lower court to substitute its judgment for that of the Commission, which these assignments of error apparently contend that it should have done.

4. In assigned error No. 6, appellant confuses the law of contracts with the statutory functions of the Interstate Commerce Commission. This is not an action in assumpsit in a court of law, but a proceeding involving the administrative judgment of an agency of the Congress. Not being a court of law, the Commission is without jurisdiction to enforce a contract. Nor would the three-judge court below have jurisdiction to determine a contractual obligation, it being a special tribunal with narrow and limited functions. *Phillips* v. *United States*, ... U. S. ....., 61 S. Ct. 480, decided February 3, 1941.

No money damages in any amount whatsoever was sought from the Commission (R. 7). Defendants before the Commission have offered and stand ready to make refund to the complainant in the amount of the difference between 3 cents a mile and 2 cents a mile, which latter rate applied for coach travel (R. 21; Commission's report, p. 705). Apparently appellant intends to test his claim to money damages before a court and jury in the action he has brought in the Circuit Court of Cook County, Illinois (R. 90; Commission's report, p. 705). Presumably, it is in relation to alleged error No. 6 that appellant (p. 73 of his brief) devotes an argument to the proposition that "refund of money is not adequate redress for the wrongful exclusion by a common carrier of an American citizen engaged in an interstate journey as a first-class passenger." The case cited by him in support of the proposition (*Brown* v. *Memphis & C. R. Co.*, 7 Fed. 51, 63) grew out of a damage suit tried before a jury. The court's remarks had to do with a plea by the defendant in the case that the jury's verdict was excessive. The relevancy of the legal proposition and the citation to the question here is not apparent.

5. Appellant's assigned errors Nos. 7, 8 and 9 relate to the sufficiency of the evidence as a support of the Commission's findings. It is for the Commission and not a court to draw its inferences from the evidence, and so long as there is warrant in the record for the judgment of the expert body it must stand. *United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320; *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125, 146; *United States, et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S. 344, 352.

SUMMARY OF ARGUMENT.

This complaint before the Interstate Commerce Commission does not differ in its essentials from other cases alleging infractions of the Act. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 146.

Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute removes the Fourteenth Amendment and the Civil Rights Act from the case, and their discussion by appellant thus becomes irrelevant.

Whether or hot the Arkansas separate-coach statute applies to an interstate passenger is of no importance, unless it can be found to have controlled the Commission's decision to the exclusion of its own administrative judgment. An analysis shows that, while the Commission took notice of the statute, it dealt with the question of accommodations within the terms of the Interstate Commerce Act. The question of an undue or unreasonable preference or prejudice being one of fact and not of law, the Commission's decision that the present accommodations furnished colored passengers on the train involved meet the requirements of the Interstate Commerce Act is conclusive.

The several court decisions cited by appellant to support his contention that the Arkansas law does not apply to an interstate passenger are not pertinent, for none of them dealt with a proceeding in which the Interstate Commerce Commission had previously exercised its statutory power. They called for a different judicial power from that invoked here. This case in-

volves merely a request by appellant for an administrative ruling from a body whose limits of jurisdiction he was bound to know. Besides the cited cases do not establish finally that a State may not adopt a legislative policy, in the exercise of its police power, for the preservation of the public peace and order, even though such a policy may incidentally affect interstate commerce, in the absence of Congressional action occupying the same field. The Congress has enacted no legislation prohibiting the separation of races on interstate journeys, although this appellant, as a Representative, has introduced three bills to make such segregation unlawful.

The Commission's order is supported by substantial evidence. A single incident growing out of appellant's lack of diligence in making Pullman reservations does not lay a basis for a finding of undue or unreasonable preference or prejudice, and, therefore, it forms no basis for an order to cease and desist from a practice.

The proof shows that these appellees provide accommodations which, the Commission finds, meet the requirements of the Interstate Commerce Act. The Commission has not made mere volume of business the test of a right, but has merely permitted volume of business to determine the reasonableness of the capacity of accommodations furnished. This is properly within the expert discretion of the regulating body.

Appellant may lawfully act only for himself in this proceeding and may not assume to represent others who are unknown and whose interest in relief is speculative. Even his need of relief becomes obscure, since he has made other trips since April 21, 1937, from Chicago, Ill., to Hot Springs, Ark., but always over another route than that involved in this case. For the single incident presented in this case, appellant is seeking a common law remedy by an action for damages in the Circuit Court of Cook County, Illinois.

ARGUMENT.

1. Appellant's acceptance of the constitutionality of the Arkansas separate-coach statute must be construed as eliminating the Fourteenth Amendment and Civil Rights Act from consideration.

On page 75 of his brief under the title, "Questions Not Involved in this Appeal," appellant makes this statement:

> "In order that the issues involved in the case at bar may not be confused we wish to state:
>
> 1. *That the constitutionality of the separate-coach law of Arkansas has not been attacked in this proceeding* but only its unconstitutional application by the Commission on the claim of the defendant Rock Island, as shown by the uncontradicted and undisputed testimony of its witness Jones, that he was not acting under any rules or regulations promulgated by the Rock Island but, as the conductor of the train and in charge of its operation on behalf of the Rock Island, he was acting under cover of the Arkansas Separate-Coach Law (R. 178)."

This statement can only be construed as the acceptance by appellant, at least for the purposes of this case, of the constitutionality of the Arkansas statute, with a reservation challenging only its application to an interstate passenger. This acceptance necessarily carries with it recognition that the Arkansas statute conforms to the requirements imposed upon a State by the Fourteenth Amendment to the Constitution of the United States. Since that amendment asserts its force upon a State and no one else, it follows that the removal from this case of the constitutionality of the Arkansas

statute carries with it the removal of any and all issues under the Fourteenth Amendment.

This serves finally to dispose of much confusion which has attended the proceeding since its initiation before the Interstate Commerce Commission. In his complaint before the Commission appellant (R. 7) alleged that the action of defendants (the Rock Island, Illinois Central and The Pullman Company) in operating under the Arkansas law is in violation of "the Fourteenth Amendment of the United States Constitution in denying to petitioner equal protection of the laws." Since that amendment is directed at the State, a railroad obviously cannot violate it. The allegation submitted to the Interstate Commerce Commission a question over which it has no jurisdiction, for the Commission is an administrative agency of the Congress which has not been empowered to determine whether a statute enacted by a State Legislature contravenes the Fourteenth Amendment or any other provision of the Constitution.[4]

In his complaint before the United States District Court for the Northern District of Illinois, from which this appeal is taken, the appellant recites that the order and findings of the Commission (R. 39, par. 15) "are a denial of the equal protection of the laws to the plaintiff as guaranteed by the Fourteenth Amendment of the United States Constitution." Thus, in the court below (R. 39), appellant urged the failure of the Commission to accord him relief under the Fourteenth Amendment as among the errors entitling him to an order setting aside, annulling and vacating the Commission's order of dismissal. So, too, in his "Specification of Errors" before this Court (Appellant's Brief, pp. 15, 16, 17), appellant claims that the final order and decree of the

[4] "We are not here considering a constitutional question, but rather questions of the [Interstate Commerce] Act." (R. 27.) *Mitchell* v. *C. R. I. & P. Ry. Co., et al.*, 229 I. C. C. 703, 710.

District Court, sustaining the order of the Interstate Commerce Commission, was erroneous because it denies appellant the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment. A denial of the equal protection of the laws can flow only from a State statute which contravenes that amendment by its terms, or which might be so unequally and oppressively administered by the public authorities as to amount to an unconstitutional discrimination by the State itself. *Yick Wo* v. *Hopkins,* 118 U. S. 356, 373.

Inasmuch as appellant now raises no question of the constitutionality of the Arkansas statute, any further discussion of the Fourteenth Amendment by appellant, either in his brief or elsewhere, becomes irrelevant.

In the Specification of Errors on page 15 of appellant's brief, the final order and decree of the District Court is declared to be erroneous because, among other things—

> "b. It was contrary to the laws passed by Congress under the Fourteenth Amendment to the Constitution and known as the Enforcement Act or Civil Rights Act Title 8, U. S. C. Chapter 3, Sections 41 and 43."

On page 64 appellant's brief discusses and quotes the Civil Rights Act, again referring to it on page 74. The equal-protection clause of the Fourteenth Amendment and the benefits of the Civil Rights Act, based upon that amendment, are only available as a prohibition against the States. *Ex Parte Virginia,* 100 U. S. 339.[5] The Civil

[5] "In the *Civil Rights case,* 109 U. S. 3, it was held that an act of Congress, entitling all persons within the jurisdiction of the United States to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances, on land or water, theatres and other places of public amusement, and made applicable to citizens of every race and color, regardless of any previous condition of servitude, was unconstitutional and void, upon the rground that the Fourteenth Amendment was prohibitory upon the States only, and the legislation authorized to be adopted by Congress for enforcing it was not direct legislation on matters respecting which the States were prohibited from making or enforcing certain laws, or doing certain acts, but was corrective legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts." *Plessy* v. *Ferguson,* 163 U. S. 537, 546.

Rights Act was first passed in 1866 after adoption of the Thirteenth Amendment. It was reenacted in 1870, after adoption of the Fourteenth Amendment, and again in 1875. The Fourteenth Amendment is a limitation upon the power of the States. The Civil Rights Act, by which the Congress gave statutory effect to the provisions of the Amendment, is similarly confined. Neither applies in respect of equal protection of the laws to an order of the Interstate Commerce Commission. Appellant could invoke their provisions only in an attack upon the State statute.

Since the appellant accepts, for this case, the constitutionality of the Arkansas statute, all contentions made under the Civil Rights Act become as irrelevant as any further discussion by appellant of the Fourteenth Amendment.

2. Whether the Arkansas statute does or does not lawfully apply to interstate passengers becomes important only if the Commission's decision depended solely upon that statute, to the exclusion of the Commission's own administrative judgment.

In seizing upon the Commission's references to the Arkansas statute, in the apparent belief that the statute controlled the Commission's judgment, appellant is ignoring all the other facts and discussions which are found in the Commission's lengthy report. In exercising its functions under the Interstate Commerce Act, the Commission could have reached the conclusion which it reached, regardless of whether there was in existence such an enactment as the statute of Arkansas.

Section 3(1) of the Interstate Commerce Act condemns *undue* or *unreasonable* preference or advantage and *undue* or *unreasonable* prejudice or disadvantage. Section 15(1) empowers the Commission, after full hearing, if it shall find such a preference or prejudice to

exist, to make an order that the carrier or carriers shall cease and desist from such violation "to the extent to which the Commission finds that the same does or will exist." In his prayer, this appellant asked the Commission (R. 7) to enter an order "commanding said defendants and each of them to cease and desist from the aforesaid violations of said Act, and establish and put in force and apply in future to the transportation of persons between the origin and destination points * named in paragraphs V and VI hereof, in lieu of the services and facilities named in said paragraphs V and VI, and such other services and facilities as the Commission may deem reasonable and just; and that such other and further order or orders be made as the Commission may consider proper in the premises."

Here the Commission was called upon by appellant to exercise its judgment upon the facts presented. Whether a preference or advantage is undue or unreasonable is a question of fact, not of law. *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 219; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170; *Pennsylvania R. Co.* v. *International Coal Mining Co.,* 230 U. S. 184, 196; *Pennsylvania R. Co.* v. *United States,* 236 U. S. 351, 361. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to decide primarily whether from facts, disputed or undisputed, in a given case preference or discrimination existed. *United States* v. *Louisville & N. R. Co.,* 235 U. S. 314, 320. "The courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the

* Chicago, Ill., and Hot Springs, Ark.

existence of forbidden preferences, advantages and discrimination." *United States et al.* v. *Chicago Heights Trucking Company, et al.*, 310 U. S. 344, 352. "Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." *Rochester Telephone Corporation* v. *United States, et al.*, 307 U. S. 125, 139, 140.

As the basis for an order requiring railroads or other defendants in a proceeding before it to cease and desist practicing an undue and unreasonable preference or prejudice, the Commission must first find the factual existence of the unlawful preference and prejudice. As we have seen, that involves a question of fact. In the present case, the Commission made no such finding of unlawfulness; therefore, there was no unlawfulness to be corrected. The question which the Commission determined was not whether the Arkansas statute was unconstitutional, but whether the incident complained of by the present appellant constituted a violation of the Interstate Commerce Act and demanded the Commission's corrective order. If therefore the Commission reached a result within its administrative discretion, appellant may not validly claim error because the Commission took notice of the existence of the law of Arkansas. These appellees refer to the text of the Commission's report, which is too lengthy for convenient analysis at this point, for an exposition of the numerous facts and reasoning which underlie the Commission's conclusions, apart from the State statute. Some of these details will be emphasized in Title 5 of this argument, dealing with the evidence before the Commission.

The Commission's power, derived from the Interstate Commerce Act, concerns itself, not with the validity of a State statute, but with the question of whether an undue prejudice is practiced against the commerce that is subject to the Interstate Commerce Act. If, on an adequate record, the Commission shall find that no such undue preference or prejudice prevails as is condemned by the Act, its findings are conclusive. Similarly, if, on an adequate record, it finds the existence of such a violation, its judgment is final and its order is valid. *Houston E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342, 359.[7]

In the case last cited the Railroad Commission of Louisiana had filed with the Interstate Commerce Commission in March, 1911, a complaint which, in substance, alleged that interstate carriers maintained unreasonable rates from Shreveport, La., to various points in Texas and unjustly discriminated in favor of traffic within the State of Texas and against similar traffic between Louisiana and Texas.

The Texas rates were made under the compulsion of State authorities. After an extensive investigation of the facts, the Commission found that by the rate adjustment complained of "an unlawful and undue preference and advantage" was given to the Texas cities and a discrimination that was "undue and unlawful" was effected against Shreveport. The Commission ordered the removal of the unlawful preference and prejudice and prescribed the manner of accomplishing it. *Railroad Commission of Louisiana* v. *St. L. S. W. Ry. Co.,* 23 I. C. C. 31. The Commission there exercised the powers lodged in it under the third section of the Act. Whether, in that case, the state-made rates imposed an unlawful prejudice against shippers at Shreveport

[7] Commonly known as "the Shreveport Case."

and constituted an unlawful preference of Texas shippers was to be judged by the facts. The Commission had first to determine that the facts established an actual and unlawful discrimination before its power to remove such a condition could come into play. There, the Commission having arrived at its judgment, this Court in *Houston E. & W. T. Ry. Co.* v. *United States,* 234 U. S. 342, upheld its authority to exercise such a power. In the course of its opinion this Court (p. 357) said:

> "Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier and subject to the States or of the agencies created by the States."

In the *Minnesota Rate Cases,* 230 U. S. 352, this Court had before it for review the validity of the action of the State of Minnesota in establishing reduced levels of freight rates for intrastate transportation throughout the State. The Court was asked to hold that an entire scheme of intrastate rates fixed by the State of Minnesota was null and void because of its effect upon interstate rates. But there had been no finding by the Interstate Commerce Commission of any unjust discrimination. This Court said (p. 419) * * * "the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the Courts."

Appellees emphasize that in the two cases just cited the major subjects were rates fixed under the law of States, and that in both instances the doctrine was firmly established that the determination of whether

such State regulations constituted an unlawful discrimination against interstate commerce belonged to the Interstate Commerce Commission.

It has become a common thing for the Commission to exercise its judgment, in situations brought to its attention, upon the lawfulness of state-made intrastate rates in their relation to interstate rates. In numerous instances the Commission has found that lower intrastate rates enforced by state authority, although applying over identical routes and railroads, are not shown to effect, in fact, an unlawful discrimination against interstate commerce. *Western Trunk Line Class Rates,* 197 I. C. C. 57; *Rates on Raw Dolomite and Fluxing Stone Within State of Ohio,* 188 I. C. C. 495; *Emergency Freight Charges Within Montana,* 214 I. C. C. 537; *Emergency Freight Charges Within Idaho,* 213 I. C. C. 130; *Emergency Freight Charges Within Oklahoma,* 211 I. C. C. 23; *Emergency Freight Charges Within Kansas,* 211 I. C. C. 225. In each case the result depended upon the particular facts. The Commission exercised its judgment wholly apart from the State law.

Appellees respectfully submit that the foregoing establishes the soundness of these propositions: (1) It is for the Commission and not for the Court to determine whether the effect of a State statute is to impose an undue and unreasonable prejudice against interstate commerce; (2) whether the effect is undue or unreasonable is a question of fact wholly within the province of the Commission to determine; (3) as a basis for an order to cease and desist practicing an undue or unreasonable preference or prejudice, the Commission must first have found such an unlawful condition to exist. While it is true that the Commission took notice of the Arkansas statute, it expressly said (R. 28; Commission's Report, p. 710) that "it is not for us to con-

strue the statute," that (R. 28; Commission's Report, p. 710) the carriers could pursue the practice of segregating the races "even if there were no statute," [a] and (R. 29; Commission's Report, p. 711) "it is not for us to enforce the State law," since it understands "that to be a matter for State authorities." Appellees, therefore, respectfully assert that appellant overemphasizes the State statute for the purpose of raising questions of law in a proceeding that rests upon questions of fact.

The ultimate question submitted to the Commission related to the character of facilities provided for colored passengers on the train from Chicago, Ill., to Hot Springs, Ark. The Commission's administrative jurisdiction over this issue, so far as undue and unreasonable prejudice or preference is concerned under Section 3 of the Act, is not doubted. The Commission makes plain in the final language of its report that its findings are within and are based on the terms of the Act which it administers. It is only with respect to segregation, and nothing else, that the Commission recognized "that under the State law defendants must segregate colored passengers," a practice which, as already pointed out, "the carriers could follow even if there were no statute." This amounts to no more than the recognition by the Commission in this case of a doctrine which it has enunciated and adhered to in all proceedings of this general nature which have been brought before it. In *Councill* v. *W. & A. R. Co.*, 1 I. C. Reports, 638, 641 (1887) the Commission held that "there is no undue prejudice or unjust preference shown by railroad companies in separating their white and colored passengers by providing cars for each, if the cars so provided are

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[a] *Chiles* v. *Chesapeake & O. R. Co.*, 218 U. S. 71.

equally safe and comfortable."[9] The doctrine was followed in *Heard* v. *Georgia Railway Co.*, 1 I. C. Reports, 719; *Edwards* v. *N. C. & St. L. R. Co.*, 12 I. C. C. 247; *Gaines* v. *Seaboard Airline Railway, et al.*, 16 I. C. C. 471; *Evans* v. *Chesapeake & Ohio Ry. Co.*, 92 I. C. C. 713. The Commission's report (p. 707) in the instant proceeding cites four of those decisions. Thus, since the Commission, over a long period of years and for public reasons considered in its several decisions, has consistently upheld as reasonable the separation of races on interstate travel, its reference to the segregation required by the Arkansas statute adds nothing to the case as a consideration controlling its conclusion. Stated differently, since the Commission for fifty-three years has construed Section 3 of the Interstate Commerce Act as not prohibiting the separation of races in interstate commerce, its administrative judgment in the present case cannot be said to rest, as appellant seems to argue, solely upon the statute of Arkansas.

The reasoning by which the Commission supported

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[9] In the case just cited the Commission said (p. 641):

"The people of the United States, by the votes of their representatives in Congress, support the public schools of the country's capital city, and here white and colored children are educated in separate schools. Congress votes public moneys to separate charities; men, black and white, pitch their tents at the base of Washington's Monument to compete in the arts of war in separate organizations. Trade unions, assemblies, and industrial associations maintain and march in separate organizations of white and colored persons.

"Public sentiment, wherever the colored population is large, sanctions and requires this separation of races, and this was recognized by counsel representing both complainant and defendant at the hearing. We cannot, therefore, say that there is any undue prejudice or unjust preferences in recognizing and acting upon this general sentiment, provided it is done on fair and equal terms. This separation may be carried out on railroad trains without disadvantage to either race and with increased comfort to both."

The Commission had warrant in the present case for assuming that Appellant Mitchell raised no issue as to segregation. It was the appellant who offered portions of the Arkansas statute at the hearing before the Commission's examiner (R. 125; text of statute, R. 211), and it was Appellant Mitchell himself who told the examiner (R. 156) that "The question of segregation is not involved." The Commission refers to the statement, p. 710 of its report (R. 27). In the trial below Appellant Mitchell made the same statement to the three-judge court (R. 227).

its doctrine that segregation of itself does not constitute an unreasonable discrimination differs in no material respect from the reasoning of this Court in its ruling that a statute of Louisiana requiring separation of the races on passenger trains was not a discrimination prohibited by the Fourteenth Amendment. *Plessy* v. *Ferguson,* 163 U. S. 537. Nor does it differ in any material respect from the reasoning of this Court in *Chiles* v. *Chesapeake & O. R. Co.,* 218 U. S. 71, wherein it was held that a railroad's regulation requiring the separation of races on passenger trains, even in connection with the travel of interstate passengers, was not unreasonable, provided substantially equal accommodations were furnished.

If separation is practiced, there must be no such differences in accommodations furnished as to constitute, as a question of fact, an unlawful preference or prejudice in violation of the Act. The Commission has decided this question of fact by holding that the facilities furnished meet the requirements of the Act. That, appellees respectfully submit, should be conclusive.

3. Court decisions cited by appellant have not dealt, in any instance, with a case in which the Interstate Commerce Commission previously exercised its statutory authority to determine an issue raised under the Interstate Commerce Act.

The several court decisions cited by appellant as sustaining his contention that the Commission erred by taking notice of the Arkansas statute have two major weaknesses.

1. Not one of them reviews the exercise by the Interstate Commerce Commission of its statutory authority to determine questions assigned to its jurisdiction by the Congress of the United States.

2. Not one of them from this Court has nullified the

separate coach statute of Arkansas or any other State as a regulation of interstate commerce, and none of them has so foreclosed the question as to deprive the Commission of its regulatory discretion under the Interstate Commerce Act.

It is not necessary to consider more than three of the cases mentioned by appellant, since the others must necessarily be tested by the same considerations.

I. *Hall* v. *De Cuir*, 95 U. S. 485 (1877). In 1869 Louisiana passed a statute requiring all those engaged in the transportation of passengers to give all persons traveling within the State equal rights and privileges in all parts of their conveyances (in this case a steamboat) without distinction on account of race or color. The Supreme Court of Louisiana construed the statute as applying to interstate as well as intrastate travel. Having before it the interpretation of the State law by the Supreme Court of the State, this Court said (p. 487): "Such was the construction given to the act in the courts below, and it is conclusive on us as the construction of a State law by the State courts." "The line which separates the powers of the States," said the opinion (p. 488), "from this exclusive power of Congress is not always distinctly marked, and oftentimes it is not easy to determine on which side a particular case belongs. Judges not unfrequently differ in their reasons for a decision in which they concur. Under such circumstances, it would be a useless task to undertake to fix an arbitrary rule by which the line must in all cases be located. It is far better to leave a matter of such delicacy to be settled in each case upon a view of the particular rights involved." The Court held that the statute as construed by the State Supreme Court infringed upon the commerce clause. It ruled that Congressional inaction left the steamboat master at liberty to adopt

such reasonable rules and regulations for the disposition of passengers upon his boat, while pursuing her voyage in Louisiana and without, as seemed to him most for the interest of all concerned. Referring to the Louisiana statute, the Court said (p. 490): "if the public good requires such legislation it must come from Congress and not from the States."

The cited case was decided ten years prior to the assertion by Congress of its power to regulate interstate commerce by the enactment of the Interstate Commerce Act, the creation of the Interstate Commerce Commission and the prescription of rules and regulations which that Commission was authorized to administer. Even the "reasonable rules and regulations" which this Court at that time left in the power of the steamboat master have been placed (so far as interstate railroads are concerned) under the control of the Interstate Commerce Commission.

It is noteworthy that in the first year of its existence (1887) the Commission was called upon to pass upon railroad regulations affecting interstate colored passengers, and accommodations provided for members of that race. *Councill* v. *W. & A. R. Co.*, 1 I. C. Reports, 638. It was then that the Commission first assumed jurisdiction of the subject under Section 3 of the Interstate Commerce Act, a jurisdiction which it has exercised ever since.

It was the jurisdiction of the Commission that this appellant invoked in submitting his complaint to that body for adjudcation. In the light of the doctrines of the Shreveport case, *Houston E. & W. T. Ry. Co.* v. *United States*, 234 U. S. 342, and the *Minnesota Rate cases*, 230 U. S. 352, it is wholly conceivable that the situation dealt with in *Hall* v. *De Cuir* would now require the primary exercise of the Commission's judgment insofar

as an alleged discrimination by a railroad under the Interstate Commerce Act might be involved. *General American Tank Car Corp.* v. *El Dorado Terminal Co.*, 308 U. S. 422; *Armour & Company* v. *Alton R. R. Co., et al.*, ... U. S. ....., decided February 3, 1941.

II. *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151 (1914). Appellant cites this case as a support of two of his contentions.

First, that it affirmatively and conclusively settled the inapplicability of a separate-coach law of a State to interstate passengers. (Appellant's brief, p. 23) We do not find in the Court's language any such finality. The Court did not decide the question. A separate-coach statute of Oklahoma had been attacked as being, among other things, repugnant to the Fourteenth Amendment and the commerce clause. The Supreme Court of Oklahoma had given the statute no interpretation. This Court, in the absence of a different construction by the State court, construed it as applying to transportation exclusively intrastate, as a means of resolving the open constitutional question into one which this Court had passed on in prior cases. By construing the Act thus, the Court found that it was constitutional, in conformity with *Louisville N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 590, and other cases cited in the Court's opinion. Aside from *Hall* v. *De Cuir, supra,* which was discussed above, appellees have found no case in which this Court has nullified a State statute of this nature.

Second, appellant cites the case (Appellant's brief, pp. 34 to 37) as supporting his claim to accommodations identical with those supplied other passengers holding similar tickets. This exposes some important contradictions in appellant's arguments. While maintaining that a State statute does not apply to interstate passengers, he relies now upon a State statute as determining his

rights as an interstate passenger. In the *McCabe Case*, this Court was meeting certain contentions of the Attorney General of Oklahoma concerning the scope and meaning of the Oklahoma statute (p. 161), although the Supreme Court of Oklahoma had given the statute no construction whatsoever. The questions arose there under the impact of the Fourteenth Amendment upon a State's enactment and the definition of that enactment by an officer of the State. Since the Arkansas statute in this case is admittedly not under attack as unconstitutional, the Fourteenth Amendment, as heretofore pointed out, has no pertinence here such as it may have had in the Oklahoma case. Appellant may not validly reject a State statute as not applying to an interstate passenger, and yet measure his rights by the interpretation of a similar State statute.

Appellant apparently mistakes the difference between the functions of the Interstate Commerce Commission under the Act which it administers and the functions of the Court in passing upon the Oklahoma statute. Under the Fourteenth Amendment the statute had to provide for equal accommodations. The Interstate Commerce Act, on the other hand, employs no such phrase. It condemns only preferences and prejudices which are undue or unreasonable, and these are questions of fact to be determined by the Commission within the framework of that Act and corrected "to the extent to which the Commission finds that the same does or will exist." But even as used in a State statute, the equality demanded is to be substantial, not identical. In the case now discussed, under a State law, this Court (p. 161) goes no further than to call for "substantial equality." In *Chiles* v. *C. & O. R. Co.*, 218 U. S. 71, this Court sustained the action of the railroad in transferring a colored passenger from a white coach into a colored compartment coach. The coaches were not identical, but the Court found

them *substantially equal* in quality, convenience and accommodations. It is obvious that the car, divided by board partitions into three compartments, was assigned to colored passengers because the volume of colored travel would not justify the assignment of an entire coach.

It is well established that the word "equal" does not mean "identical." The Supreme Court of Arkansas, dealing with the separate coach law of that State, *Choctaw, O. & G. R. Co.* v. *State,* 87 S. W. 426, said (p. 427):

> "What one man or set of men might consider sufficient would not be so considered by another. The same may be said of the word 'equal.' The accommodations need not be the same within the meaning and spirit of the statute; its object being to prevent discrimination. In this sense, one might consider accommodations equal, when another would not."

What may be equal accommodations within the purview of a State statute is a question primarily to be decided by the State courts of the State concerned. It is not shown that this appellant has made any resort to the Arkansas courts. Appellant may not properly, apart from the contradiction in position heretofore mentioned, base a claim on a State statute and apply to the Federal regulatory body to enforce it.

Appellant charges that the Commission has permitted his rights to be controlled by mere volume of business, and he cites the *McCabe Case* as demonstrating that body's error. Here, appellees believe, the appellant has read into the Commission's report something which is not there and has misconceived the rational purpose of the regulating body. The Commission has not determined rights on the basis of volume of traffic, but has only passed upon the measure of the capacity necessary to accord those rights—the volume of accommodations

required for colored passengers in view of the very slight demand for such accommodations. This, of course, is a quite different thing. It is wholly within the Commission's duty to consider the public interest in the avoidance of wasteful and unnecessary services by interstate carriers. It is not called upon to require accommodations for imaginary travelers. It finds that present accommodations meet the requirements of the Act, and that the discrimination and prejudice is plainly not unjust or undue.

III. *State of Missouri ex rel. Lloyd Gaines* v. *Canada*, 305 U. S. 337. This case presented a direct attack upon the State of Missouri for denying a colored student admission to the law department of the University of Missouri, on the ground that the State violated the provisions of the Fourteenth Amendment by denying the student the equal protection of the laws. The facts need not be rehearsed. The case combined a State law, a State's conduct and the Fourteenth Amendment. Except that a colored student was involved, it is difficult to discern any remote legal connection between that case and the proceedings now before this Court. In the first place, the case did not involve commerce. In the second place, Congress had not provided for a determination of the complaint by an administrative agency. Third, the judicial power invoked differed decidedly from the judicial power engaged by an action before a special three-judge court to set aside and annul an order of the Commission in an adjudicated case.

Were the case otherwise pertinent, it would present one uncompromising difference. There the exclusion of the student from the State University was continuous. Here the exclusion was casual, on a single run of a train which runs three hundred and sixty-five days a year and on which sufficient accommodations are provided for

colored passengers who show the same diligence as white passengers in making reservations.

4. This Court has sustained laws of States enacted to meet local conditions, even though they incidentally affect interstate commerce, when congressional legislation has not occupied the field.

Maintaining unreservedly the position heretofore expressed, that the statute of Arkansas is important only if the Commission's decision depended solely upon that statute, to the exclusion of the Commission's administrative judgment; that the Commission's report shows that it represents an exercise of the body's administrative judgment, and that this Court has not annulled the Arkansas statute or any other similar State statute, as is contended by appellant, these appellees now present reasons for the view that the State statute may have more force in its relation to interstate passengers than appellant now, after completely shifting his position, concedes to it.

Appellees are led to this discussion by appellant's repeated statements that both the railroads and the Commission should know that the State statute was of no effect.

It is common knowledge that approximately a quarter of the forty-eight states have laws similar to that of Arkansas, and, in the absence of a different construction by a State Supreme Court, they are enforceable against all passengers traveling within the State. These appellees are neither lawmakers nor law interpreters, but are subjects to law. They may not arbitrarily ignore or defy such an enactment, and their employes on trains are, as individuals, subjected to penalties for violations. They take no position concerning the merits of the practice of separation required by the statutes, but they must give heed to the legislative policy thus

imposed and to the community sentiment upon which that policy rests. Let us repeat, that the question before the Commission was not, and could not be, the validity of the State statute, but only one involving an alleged undue preference and prejudice under the terms of the Interstate Commerce Act, whether or not the Arkansas statute existed.

It is true, as stated in appellant's brief (p. 28), that the Supreme Court of Maryland in *Hart* v. *State,* 60 Atl. 457 (1905), affirmatively held that the separate coach law of Maryland was void in so far as it applied to interstate passengers. There have been no such judgments among the southern State courts in general.

The doctrine underlying such statutes as that of Arkansas seems to be that the State is within its sovereign rights in asserting its police power, in view of local conditions, to enact measures for the preservation of peace and order, entirely apart from any relation to commerce as such. At least two State Supreme Courts have held segregation statutes to apply both to intrastate and interstate passengers.

In *Alabama & V. Ry. Co.* v. *Morris* (1912) 103 Miss. 511, 60 So. 11, the Court in discussing the Mississippi segregation statute stated (pp. 13, 14):

> "The statute was not enacted with any idea of discriminating against the members of either race; nor was it prompted by prejudice or passion, but with the knowledge that the enforced intermingling of the races would be distasteful to both races, would inevitably result in discomfort to both, and provoke and encourage conflicts endangering the peace and quiet of the commonwealth. * * *
>
> "This statute has been upon our books for many years, and has caused no complaint or criticism from the inhabitants of the state. * * *
>
> "The two races here accept the law as a wise and necessary exercise of the police power of the

state for the protection of members of both races. No greater punishment could be inflicted upon the average negro traveler than being obliged to sit in the coach set apart for whites, and our colored fellow citizens would be the first to oppose a repeal of the statute.

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississipian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. * * *

"If the peculiar conditions existing here demanded this legislation to conserve the peace of the State, and our lawmakers have so decided, the mere fact that the passenger is going out of the State, coming into the State from without, or traveling across the State, does not alter the complexion of affairs nor render the danger less, should a negro or white man be required, against his will, to occupy a car with passengers of another race.

"Each section of our common country has its own problems, and the laws of one State may not be necessary in another State; * * * The statute in question, rather than burdening the carrier, is an aid to the peaceful operation of its business; and we have no doubt that its overthrow would create intolerable conditions from which the railway company would be the first and greatest sufferer."

To the same effect: *Southern Ry. Co.* v. *Norton* (1916) 112 Miss. 302, 73 So. 1; *Southern Ry. Co.* v. *Primrose* (1916) 73 So. 2; and *Smith* v. *State* (1898) 100 Tenn. 494, 46 S. W. 566.

The exercise of the State regulatory power has often been sustained, although it has incidentally affected or has even burdened or impeded interstate commerce. In *Chicago, R. I. & P. R. Co.* v. *Arkansas,* 219 U. S. 453, and

St. L. I. M. & S. R. Co. v. *Arkansas,* 240 U. S. 518, this Court held that an Arkansas statute, applying both to intrastate and interstate railroad trains, which required certain numbers of men in their crews was a valid exercise of the State police power and was not void as a burden on or interference with interstate commerce. So long as the State action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the States in the absence of Congressional action constitutionally exercised in the same field. *South Carolina Highway Department* v. *Barnwell Bros.,* 303 U. S. 161; *Maurer, et al.* v. *Hamilton, et al.,* 309 U. S. 598; *Eichholz* v. *Public Service Commission of Missouri, et al.,* 306 U. S. 268. In the last case cited, this Court said:

> "But in the absence of the exercise of federal authority, and in the light of local exigencies, the State is free to act in order to protect its legitimate interests even though interstate commerce is directly affected. *Cooley* v. *Board of Wardens,* 12 How. 299, 319; *Morgan's S. S. Co.* v. *Louisiana,* 118 U. S. 455; *Smith* v. *Alabama,* 124 U. S. 465; *Kelly* v. *Washington,* 302 U. S. 1, 9, 10."

The foregoing utterances from this Court appear to negative a quotation from Mr. Justice Miller (Appellant's brief, p. 29) in *Railway Company* v. *Illinois,* 118 U. S. 557, to the effect that "this court holds now, and has never consciously held otherwise, that a statute of a State intended to regulate or to tax, or to impose any other restriction upon the transmission of persons or property or telegraph messages from one State to another is not within that class of legislation which the States may enact in the absence of legislation by Congress; and that such statutes are void even as to that part of such transmission which may be within the

State." Attention is called especially to the word "tax" in the foregoing quotation. In recent cases involving the levy of certain State taxes, arguments were forcefully presented that the taxes were a burden upon and an interference with interstate commerce, in like manner that appellant now urges his contention against the Arkansas statute. This Court upheld such taxes. *Henneford* v. *Silas Mason Company*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Nelson* v. *Sears Roebuck & Co.*, ... U. S. ....., decided February 17, 1941. In the last cited case, Mr. Justice Douglas, speaking for the Court, said:

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce. Hence a review of prior adjudications based on widely disparate facts, howsoever imbedded in general propositions, does not facilitate an answer to the present problem."

In the light of doctrines and decisions thus considered, appellees were and are without an alternative to the observance of the statute of Arkansas.

If one of the purposes of appellant was to have the practice of segregation, whether under the State statute or not, declared to be unlawful, it may be remarked that he asked the Interstate Commerce Commission, an agency of Congress, to enact legislation which the Congress itself has declined to adopt.

It cannot be questioned that Congress, under the commerce clause of the Constitution, has power to make unlawful the segregation of interstate passengers, thereby occupying the field and dispossessing the States of such power as they now exert over the subject. The Commission, as previously shown, has consistently held

that segregation in itself is not a prohibited discrimination under the Interstate Commerce Act. It merely adhered to its adopted doctrine in this proceeding. The Congress is presumed to be advised of the activity of its agent, as well as the existence of the legislative policy of the numerous States having separate coach laws.

The journals of the two Houses of the Congress are judicially noticed by Federal courts. *U. S.* v. *Lowden, et al.,* 308 U. S. 225, 237, 239. 23 Corpus Juris 102, Sec. 1902. The lower court was asked by appellees to take judicial notice of bills offered in the Congress dealing with this subject (R. 250). The same request is made of this Court.

On January 5, 1938, Representative Mitchell, the appellant herein, introduced in the House of Representatives a bill, H. R. 8821, to amend the Transportation Act (U. S. C. title 49, sec. 3(1)) by adding the following:

> "It shall be unlawful to segregate any persons traveling as interstate passengers on any carrier subject to the provisions of this Act, or in railroad stations, waiting rooms, rest rooms, lunch rooms, restaurants, dining cars, or in any other accommodations provided for passengers traveling interstate, on account of such passengers' race, color, or religion; and any such discrimination or attempted discrimination shall subject the offending carrier, its officers, agents, servants, and employes, to the penalties hereinafter provided for violations of this Act."

The bill was referred to the Committee on Interstate and Foreign commerce. It was never reported out.

On January 3, 1939, the Representative reintroduced the bill, H. R. 182, which was referred to the same committee. It was never reported out, although during the subsequent period the committee was engaged in

studying and developing extensive revisions of the Interstate Commerce Act which were finally enacted and approved September 18, 1940, as the Transportation Act of 1940.

On January 3, 1941, the Representative introduced the same bill in the House of Representatives, and again it was referred to the Committee on Interstate and Foreign commerce. H. R. 112, 77th Congress, 1st Session.

The subject, therefore, is now before the Congress for disposition. Perhaps the complainant thus has his proposal of a national legislative policy before the proper forum, wherein the elected representatives from forty-eight States may determine whether the sovereignity exercised over the subject by approximately a quarter of the States is to be overruled by Federal action.

It is significant that, despite many years of agitation and repeated court decisions sustaining State policies of segregation, the Congress has not seen fit to enact legislation bearing directly on this controversial subject.

5. Appellant may not complain except in his own behalf, and he must establish his individual need of the remedy asked.

When the case is stripped of confusing allegations and arguments, it is revealed as a complaint before the Interstate Commerce Commission which invoked only the authority and jurisdiction which the Commission possessed. It was this appellant who elected to proceed before the Commission within the confines of the Interstate Commerce Act, and he may not complain because the Commission exercised only such authority as the Congress had conferred on it.

In his complaint before the Commission, this appellant alleged a single incident, the one in which he figured

(R. 3). Nor was any other witness produced who had a like experience. Yet, appellant (the complainant there) undertook to aver that "said *practice* of the defendants * * * causes undue and unreasonable prejudice to this complainant and *all colored persons* who in the future will use, as interstate passengers, the lines of the said defendants." Defendants objected at the hearing to expanding this case beyond the issue relating to this individual plaintiff on the particular train of April 21, 1937, an objection to which they adhered through the proceeding before the Commission. Commission's report, p. 704. The Commission overruled the objections. Since, however, the appellant introduced proof of but the single incident, the proof hardly met the wide allegations of undue and unreasonable prejudice to "this complainant and *all other colored persons.*"

The prayer was that the Commission make an order commanding "said defendants and each of them to desist from the aforesaid violations of said Act and establish and put in force and apply in future to the transportation of persons between the origin and destination points named in paragraphs V and VI hereof, in lieu of the services and facilities named in said paragraphs V and VI, and such other services and facilities as the Commission may deem reasonable and just." Recurrence of such an incident may not be assumed. Inasmuch as no other examples have been submitted and the train has been running daily, both before and since April 21, 1937, the failure to prove any other or similar experiences is significant.

In the circumstances, these appellees submit that the complaint before the Commission could involve no individual except only this appellant. There is no evidence that this appellant had ever before or since been unable to obtain Pullman accommodation on the train in question. There is no evidence that he ever will be deprived

of accommodations in the Pullman from Chicago, Ill., to Hot Springs, Ark.

Addressing the court below, as plaintiff and as his own counsel, the appellant (R. 255) said: "As a matter of fact, I have been down to Hot Springs several times since this thing happened. Of course, I have not gone down there on the Rock Island Railroad."

If that statement does not make the issue moot so far as this individual is concerned, it at least establishes that his interest in the relief sought is theoretic and not real. As the proof shows, and as the Commission finds (R. 29), Pullman accommodations of adequate capacity are provided. If, by exercising the ordinary diligence of average travelers, appellant had obtained such accommodations on subsequent trips, this case would have been destroyed.

Nor may this appellant properly complain in behalf of any one other than himself.

In *McCabe* v. *A. T. & S. F. Ry. Co.*, 235 U. S. 151, five negro citizens of the State of Oklahoma filed a suit in the United States District Court against five railroad corporations to restrain them from complying with the State statute of Oklahoma, about to become effective, requiring separate but equal accommodations for white and colored races. After the Act had been in operation for a few days an amended bill was filed seeking specifically to enjoin compliance for the alleged reasons that the Act was repugnant to the commerce clause of the Federal Constitution, the Enabling Act and the Fourteenth Amendment. This Court, affirming the lower court's dismissal of the injunction suit, rejected the right of the five plaintiffs to act for anyone other than themselves. The Court ruled (p. 162):

> "There is, however, an insuperable obstacle to the granting of the relief sought by this bill. It

> was filed, as we have seen, by five persons against five railroad corporations to restrain them from complying with the state statute. The suit had been brought before the law went into effect and this amended bill was filed very shortly after. It contains some general allegations as to discriminations in the supply of facilities and as to the hardships which will ensue. It states that there will be a 'multiplicity of suits,' there being at least 'fifty thousand persons of the negro race in the State of Oklahoma' who will be injured and deprived of their civil rights. But we are dealing here with the case of the complainants, and nothing is shown to entitle them to an injunction. It is an elementary principle that, in order to justify the granting of this extraordinary relief, the complainant's need of it, and the absence of an adequate remedy at law, must clearly appear. The complainant cannot succeed because someone else may be hurt. Nor does it make any difference that other persons who may be injured are persons of the same race or occupation. It is the fact, clearly established, of injury to the complainant—not to others—which justifies judicial intervention. *Williams* v. *Hagood*, 98 U. S. 72, 74, 75; *Virginia Coupon Cases*, 114 U. S. 325, 328, 329; *Tyler* v. *Judges*, 179 U. S. 405, 406; *Turpin* v. *Lemon*, 187 U. S. 51, 60; *Davis & Farnum* v. *Los Angeles*, 189 U. S. 207, 220; *Hooker* v. *Burr*, 194 U. S. 415, 419; *Braxton County Court* v. *West Virginia*, 208 U. S. 192, 197; *Collins* v. *Texas*, 223 U. S. 288, 295, 296."

It is true that the above quotation related to relief sought from a court of equity, not from the Interstate Commerce Commission. But its pertinence is evident, for here we have a case in which the Commission was asked to enter an order which in its force and effect would be injunctive, and this court, with its equitable powers is, in turn, asked to annul a Commission's order refusing relief to a complainant in circumstances similar to those in the *McCabe Case*.

The Court concluded (p. 164):

> "Nor is there anything to show that in case any of these complainants offers himself as a passenger on any of these roads and is refused accommodations equal to those afforded to others on a like journey, *he will not have an adequate remedy at law*. The desire to obtain a sweeping injunction cannot be accepted as a substitute for compliance with the general rule that the complainant must present facts sufficient to show that *his individual need* requires the remedy for which he asks."

That this plaintiff has a remedy at law is evident by his pending action for damages in the Circuit Court of Cook County, Illinois, based upon the incident involved herein (R. 90).

That the case is that of an individual is further supported by the petition to the lower court (paragraph XXVIII) in which it is alleged (R. 39) that "the plaintiff will suffer irreparable loss and damage unless the said order entered November 7, 1938, be set aside, annulled and vacated." Apart from plaintiff's failure to prove irreparable loss and damage, the allegation is plainly confined to the plaintiff alone.

6. Commission's report and order are supported by substantial evidence, and the finding of the lower court should be affirmed.

In alleging, as he does, that the Commission's report and order are not supported by the evidence, or that they are contrary to the evidence, appellant fails to give to the Commission's judgment the conclusive force which this court consistently ascribes to it. Even without a survey of the transcript of evidence before the Commission, a reading of the Commission's report based on that evidence proves by itself that the Commission's decision rested upon substantial evidence, from which

the Commission was empowered to draw its own inferences.

Little need be said concerning the colored coach into which the appellant was moved. Practically all the testimony of five witnesses produced before the Commission by the appellant consisted of their recollections as to coaches assigned for colored travel on the Rock Island in Arkansas. Since some of it went back as far as 1904 and 1926 and other past periods, its relation to Appellant Mitchell's trip in 1937 was, to say the least, remote. The Commission's report contains the appellant's description of the colored compartment car in the train on which he rode, a description which was rebutted by employes of the Rock Island railroad familiar with the coach. The appellant sought from this Commission an order covering the future. The fact that the colored coach at that time in use was displaced in July, 1937, by a new and improved type of car removed the issue as to coach accommodations. The Commission describes the new coach in detail, and it affirmatively finds that "the combination coach is as fully desirable in all its appointments as the coach used entirely by white passengers traveling at second-class fare."

As to Pullman accommodations, the Commission draws attention to the fact that the complaint mentions but a single incident of alleged discrimination and prejudice, the one in which this appellant was involved. In his complaint before the Commission, appellant alleged that it was on April 20, 1937, that he applied for a ticket and a Pullman bedroom from Chicago, Ill., to Hot Springs, Ark. That was on the day of the train's departure. The conductor of the Rock Island's train testified (R. 130) that when the appellant applied for a seat in the Pullman he made an effort to find one for him in a Pullman drawing-room or compartment, but the rooms were occupied. The Commission finds that the use of

one of the drawing-rooms would have amounted to segregation under the State law and ordinarily such accommodations are available to colored passengers upon demand, the 90-cent fare being applicable. "Occasionally they are used by colored passengers," the Commission states, "but in this instance both drawing rooms were already occupied by white passengers." The Commission finds that "only one negro to twenty white passengers rides this train from and to points on the line between Memphis and Hot Springs, and there is hardly ever a demand from a colored passenger for Pullman accommodations." The Commission cites the conductor's estimate that the demand from colored passengers for Pullman accommodations did not amount to one per year. In this connection, the train conductor (R. 138) testified that if at the time there had been a vacant drawing room in the Pullman car he would have put the appellant in there. He testified (R. 145) that, considering the number of colored persons who travel in Pullmans on this train, the drawing-rooms and compartments are adequate to take care of all who desire Pullman accommodations. Ordinarily, he testified, he can accommodate in a drawing-room or in a compartment the colored applicant for Pullman accommodations and at the same time comply with the Arkansas law (R. 147). When the witness has a drawing-room or compartment available (R. 149) he puts the colored passengers in that space, leaving the door open, fronting out on the aisle, and the passenger pays only a seat fare.

After examining all the proof offered by all parties, the Commission resolved the case into its proper and quite simple proportions. It found that the appellees provide accommodations which meet the requirements of the Act. Appellees stress here the circumstance that appellant had shown no diligence in undertaking to make

reservations, and that it is a common experience of travelers to find accommodations, otherwise adequate, unavailable because of their own delay. This does not mean that accommodations are denied to a passenger, or that they are insufficient to supply the normal demand.

If the Rock Island railroad operated a separate Pullman car for colored passengers between Memphis, Tenn., and Hot Springs, Ark., and that car happened to be filled to capacity on a particular day it would be extravagant to claim that any additional colored passengers would have ground for a claim of unlawful discrimination by reason of the fact that the accommodations, ordinarily sufficient for all travel, were insufficient on the day in question.

That is essentially what a railroad does when it assigns the colored passenger to a Pullman compartment or drawing-room. Those accommodations are ordinarily enough to take care of colored travel. On the day that Mitchell made his trip they were not enough. It is immaterial that they happened to be occupied by white persons. If they had been occupied by colored passengers the prior purchase of available facilities would have created the same situation.

In *Gaines* v. *Seaboard Air Line Co.*, 16 I. C. C. 471, 475, the Interstate Commerce Commission used this pertinent language:

> "Throughout the record an attempt was made on behalf of complainants to prove that colored passengers are discriminated against in the sale of accommodations on train No. 38 of the Southern Railway. This train and its companion No. 37, running in the opposite direction, are the finest trains on that road. It is composed exclusively of Pullman cars and has the desirable features of a club car and an observation car. It runs upon a limited schedule between New Orleans and New York, and

reservations on this train are in great demand at every station where it stops. * * * Reservations for space must often be made days in advance.

"That colored people at Atlanta find it impossible to get reservations on that train within a few hours of the time of departure indicates absolutely nothing in the nature of discrimination. White people are glad to get such reservations and put themselves to some trouble in advance to get them.

"This case was heard at Atlanta on the 17th, 18th, and 19th of September, 1908; September 19 three Interstate Commerce Commissioners desired to get reservations on train No. 37, New York-New Orleans Vestibuled Limited, from Washington to Atlanta and failed; they were obliged to take a slower train without a club and observation car, and over a longer route."

The three Commissioners referred to in the foregoing evidently did not regard themselves as having been victims of an unlawful discrimination.

In that case (p. 476) the Commission found, as it did in the present proceeding, that in compliance with the laws of Georgia and the sentiment there "negroes are assigned to the drawing room, or separate compartments, so far as possible, even in interstate travel." It found that undue discrimination or prejudice had not been shown, and the complaint was dismissed. In the course of its report it found (p. 474) that the proportion of negro to white passengers on long journeys, such as make sleeping accommodations necessary, is infinitesimal.

It is not for a court to weigh the evidence or to derive therefrom its own inferences. After much discussion in which appellant appears to ask this court to determine the weight of the evidence and to exercise its judgment thereon, appellant says (p. 76 of his brief):

"We are not asking this Court to consider the weight of conflicting evidence nor the wisdom of the order entered by the Commission. Such request, we know, would be unavailing under the decisions of this Court, nor to substitute its judgment on conflicting evidence for that of the Interstate Commerce Commission on matters purely administrative, nor to consider the credibility of witnesses."

In that paragraph appellant correctly states the law as it has been repeatedly expressed by this court. The quotations, excerpts and abstracts of testimony which appellant scatters through his brief and its appendix in an effort to establish a conflict in evidence are without any relevancy whatsoever to the issue before this court.

The issue is not whether there was conflicting evidence, but only, and strictly, whether there was substantial evidence upon which the Commission may have reached its conclusion. The right or the wrong of such conclusions, so far as they represent an exercise of the Commission's statutory discretion, is not for the court to consider. These appellees, therefore, are not called upon to give any attention to such material found in appellant's brief and the appendix thereto.

Since the decision in *Rochester Telephone Corporation* v. *U. S., et al.,* 307 U. S. 125, so-called "negative" orders of the Commission—into which category the present Commission's order would fall—are treated for purposes of review similarly to the so-called "affirmative" orders, and, hence, become reviewable. But this court was careful to point out that this decision did not enlarge the scope of review. It restated the limited range of review that is open to one appealing from an order of an administrative body:

"Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting Con-

stitutional power, statutory authority and the basic requisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. *Interstate Commerce Commission* v. *Illinois Central Railroad,* 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541."

This review presents no questions of the Commission's constitutional power or statutory authority. It is but a step in the proceedings instituted by the appellant before the Interstate Commerce Commission, and its scope must be limited to questions which are proper for the Commission's consideration within the definitions and limits fixed by the Act under which it functions.

This court concluded its opinion in the *Rochester Telephone case* with this pertinent language (p. 146):

> "So long as there is warrant in the record for the judgment of the expert body it must stand * * * Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body. *Mississippi Valley Barge Line Co.* v. *United States,* 292 U. S. 282, 2860287; *Swayne & Hoyt Ltd.* v. *United States,* 300 U. S. 297, 303 *et seq.*"

This court stated in *Manufacturers Railway Co.* v. *United States,* 246 U. S. 457 (at p. 481):

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of those questions of fact that have been confided by Congress to the judgment and discretion of the Commission (*Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 170), and upon which its decisions, made the basis of admin-

istrative orders operating *in future,* are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power. This results from the provisions of sections 15 and 16 of the Commerce Act as amended in 1906 and 1910 (34 Stat. 589-591, c. 3591; 36 Stat. 551-554, c. 309), expounded in familiar decisions. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.,* 215 U. S. 452, 469-470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,* 222 U. S. 541, 547; *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, 297-298; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91.

"In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I. C. C. 104, 105; 32 I. C. C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. *United States* v. *Louisville & Nashville R. R. Co.,* 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States,* 236 U. S. 351, 361.

Recently this Court had another opportunity to define the limits of review on an appeal from an order of the Commission. In *The United States of America, et al.* v. *Chicago Heights Trucking Company, et al.,* 310 U. S. 344, 352, certain trucking companies had filed a tariff with the Commission, which that body suspended, pend-

ing investigation into its lawfulness. *Although only evidence supporting the tariffs* was introduced, the Commission found the tariff unlawful and ordered its permanent cancellation. A minority opinion was also released. The trucking companies appealed to a three-judge court, which enjoined the Commission's order.

In reversing the court below and ordering dismissal of the suit, this court stated at page 352:

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed. And where a court substituted 'its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, (the court) obviously exerted an authority not conferred upon it by the statute.' *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. So here, it has been pointed out that there was no dispute in the evidence before the Commission, all of which was introduced by respondents. But the differing inferences as to discrimination finding possible support in that evidence are made to stand out by the persuasive reasoning advanced in both the majority and minority opinions of the Commission. The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when 'undue,' 'unjust,' 'unfair,' and 'unreasonable.' And the courts have always recognized that Congress intended to commit to the Commission the determination by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

This language is particularly applicable to the present proceeding. Holding that "only differences in treatment that are unjust or undue are unlawful and within the power of this Commission to condemn, remove, and prevent," the Commission, expressly finding that no such unlawful differences existed, dismissed the complaint.

The determination of the Commission, after its application "of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination," should not be disturbed. There should be "ascribed" to it "the strength due to the judgment of a tribunal appointed by law and informed by experience." *Illinois Central R. R.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454.

Accordingly the order of the District Court dismissing the petition should be affirmed.

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